No. (1)

In The Supreme Court of the United States

AMADOU BAILLO BARRY,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an Immigration Judge's conclusion that an alien did not meet the standard of proof required to show that he filed his asylum application within one year of entry into the United States was reviewable by the federal court of appeals.

Whether this honorable Court should resolve a split between the Eleventh Circuit U.S. Court of Appeals and the Second and Ninth Circuits, as to what extent the Immigration Judge's decision that the asylum application was not timely filed is reviewable by the court of appeals.

PARTIES TO PROCEEDING

The Petitioner is Amadou Barry. The Respondent is Eric Holder, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Amadou Barry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. The opinion of the Board of Immigration Appeals affirming the final order of removal is unreported. The opinion of the Immigration Judge ordering the Petitioner removed from the United States is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 208(a)(2)(B) of the Immigration and Nationality Act, codified at section 1158(a)(2)(B) of Title 8 of the United States Code, provides in relevant part that an alien is not eligible for asylum unless he "demonstrates by clear and convincing

evidence that the application has been filed within one year after the date of the alien's arrival in the United States."

Section 242(a)(2)(D) of the Immigration and Nationality Act, codified at section 1252(a)(2)(D) of Title 8 of the United States Code, provides that no other provision in that chapter "which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."

STATEMENT

This case involves the issue of whether the courts of appeals have jurisdiction to review the legal issue of whether an immigration judge applied the correct standard of review in determining that an alien did not file his asylum application within one year of the date of entry into the United States. There is a circuit split over to what extent mixed issues of law and fact are reviewable. The Second and Ninth circuits take an expansive view of this grant of jurisdiction, while the Eleventh Circuit take a per se position against any review. The First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Tenth circuits have held that there is a narrow span of issues that are reviewable, but have only found jurisdiction in a few instances. Hence, to resolve this split in the Circuits, this Honorable Court should grant a writ of *certiorari* in this case.

Petitioner is a native and citizen of Guinea who claimed to have entered the United States on August 4, 2004, with a fraudulent Dutch passport, fleeing persecution in his home country. Petitioner submitted to the Immigration Court an I-94W Departure Record in the name of Henry Wija, a citizen of the Netherlands, stamped by the U.S. Customs and Border Protection on August 4, 2004, indicating entry into the United States on a visa waiver on that day. Petitioner claimed that this was the exact document that was issued to him when he entered the United States. Petitioner was placed in removal proceedings on May 10, 2005, when Immigration and Customs Enforcement charged him with being unlawfully present in the United States, in violation of INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). Petitioner then filed an application for asylum and withholding of removal with the Immigration Court on July 6, 2005, as indicated by the file stamp on the cover page of the application.

After a hearing on Petitioner's asylum claim, the Immigration Judge (hereinafter "IJ") denied Petitioner's application and ordered him removed from the United States. The IJ found that Petitioner failed to file his asylum application within one year of entry, as there was no evidence in the record of Petitioner's date of entry into the United States. The IJ found that Petitioner could not prove he actually entered with the I-94W card he presented to the Court. Moreover, the IJ found that even if she were to believe that he entered in that manner, the asylum application was not "filed" until it was received in open court on September 27, 2005, more than one year after that entry date, even though it

had been filed with the court in July 2005, which was within the one-year period. The IJ also denied Petitioner withholding of removal because she found that his testimony regarding the persecution he suffered in his home country was not credible. The BIA affirmed the IJ's decision, finding that the I-94W card was not adequate evidence to establish Petitioner's date of arrival in the United States.

On Petition for Review to the Eleventh Circuit U.S. Court of Appeals, Petitioner argued that the IJ must have relied on a higher burden of proof in finding that Petitioner could not establish his entry date with the I-94W card and Petitioner's consistent testimony of his entry date were not sufficient proof. Petitioner further argued that the IJ erroneously concluded that the only manner of filing the asylum application was to do so in open court, despite the fact that Petitioner had no control over what date he would be summoned to court. The Eleventh Circuit held that "Barry's argument challenges the finding that his application for asylum was untimely, which we lack jurisdiction to review."

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's current holding that there is no circumstance wherein they are able to review the Board of Immigration Appeals' determination on the one year asylum filing issue not only is a misapplication of the law, but is at odds with a majority of other circuits that have considered this issue. Therefore, it is necessary for this Honorable Court to resolve the split in among the circuits on this particular issue.

A. Judicial Review of the One-Year Bar

An applicant for asylum must demonstrate by clear and convincing evidence that he filed an application within one year of arrival in the United States or that he meets one of the exceptions for failing to file within the one-year deadline. INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(2).

Prior to the passage of the Real ID Act, Pub. L. 109-13, 119 Stat. 231 (May 11, 2005), INA § 242(a)(2)(B) restricted federal court review of certain discretionary decisions in immigration cases, including the determination of whether the alien was eligible for asylum under INA § 208(a)(2)(B). See Fahim v. U.S. Attorney Gen., 278 F.3d 1216, 1217 (11th Cir. 2002). The Real ID Act amended § 242(a)(2)(B) to allow review of constitutional claims and questions of law, notwithstanding any other provisions of law. See Vasile v. Gonzales, 417 F.3d 766, 768 (7th Cir. 2005). The Eleventh Circuit has found that the IJ's determination that an asylum application is time-barred is still a non-reviewable discretionary decision, even after the Real ID Act. Chacon-Botero v. U.S. Attorney Gen., 427 F.3d 954 (11th Cir. 2005). Specifically, the Eleventh Circuit held that the timeliness of an asylum application is *per se* not a constitutional claim or question of law contemplated in the Real ID Act. Id. at 957.

There is a definite circuit split on the issue in question, as the Second and Ninth circuits have expressed more expansive views as to what is

reviewable with respect to the one-year bar to asylum. The First, Second, Third, Fifth, Seventh, Eighth, and Tenth circuits concur that some issues are reviewable as "constitutional challenges" and "questions of law," though they take a narrow view as to what those issues could be. The Eleventh Circuit stands alone with its *per se* rule that any asylum timeliness determination, as a matter of law, is not a constitutional claim or question of law.

B. The Expansive View

The Second Circuit first examined the Real ID Act's affect on this issue in Chen v. Gonzales, 471 F.3d 315 (2d Cir. 2006). It noted that, although the term "constitutional claims" has a clear meaning, the term "questions of law" was subject to countless interpretations. Id. at 324. Turning to the legislative history to resolve the ambiguity, the Court first looked to a conference committee report that indicated that the first draft of the legislation included the term "pure questions of law," but the word "pure" eventually was dropped because the intention of the provision was to restore judicial review over those issues that traditionally were reviewable in a habeas petition, which included constitutional claims and issues of statutory construction. Id. at 326 (citing H.R. Rep. No. 109-72, at 175 (2005)).

Although the Court, in its initial decision, Chen v. Gonzales, 434 F.3d 144, 153 (2d Cir. 2006), had stopped here and concluded that "questions of law" meant "questions of statutory construction," on rehearing it went further. Because the Real ID Act

was Congress's reaction to the concerns that the Supreme Court raised in INS v. St. Cyr, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), about the constitutional ramifications of stripping judicial review of all habeas cases, the Second Circuit concluded that Congress intended to "provide a scheme [of judicial review] which is an 'adequate and effective' substitute for habeas corpus." Chen, 471 F.3d at 326 (citations omitted). Reviewing St. Cyr, the Court noted that some of the decisions traditionally considered on habeas review included "detentions based on *errors of law*, including the erroneous *application or interpretation* of statutes," (emphases added), as well as challenges to "executive interpretations of the immigration laws," and determinations regarding an alien's "statutory eligibility for discretionary relief," Furthermore, one of the habeas corpus cases on which St. Cyr relied. . . involved the application and interpretation of a *regulation*, not a statute." Id. at 327-38 (citations omitted).

While not defining the "precise outer limits" of decisions that are reviewable as "questions of law," the Second Circuit in Chen held that it remained "deprived of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's fact-finding or the wisdom of his exercise of discretion and raises neither a constitutional claim nor a question of law." Chen, 471 F.3d at 328-29. It found that, in that case, where the alien alleged that the IJ erred in finding that she did not demonstrate changed or extraordinary circumstances to excuse the delay, based on her claim that the IJ erred in concluding

that "nothing had changed" in China's family planning policies. The court noted that the alien could not shoehorn her argument into a "question of law" by using the talismanic statement that the IJ "failed to apply the law," when all it amounted to was a disagreement over the IJ's factual findings and exercise of discretion. Id. at 331-332.

The Second Circuit eventually did find a case where the IJ's decision on an asylum bar amounted to a constitutional error that it could review. In Zheng v. Mukasey, ICE alleged in the Notice to Appear that the alien had entered the United States illegally on December 15, 2004, and the alien admitted that fact at his first master calendar hearing. 552 F.3d 277, 279 (2d Cir. 2009). The alien filed his asylum application on March 18, 2005, well within one year. The IJ found, nevertheless, that the alien had failed to establish his entry date by clear and convincing evidence because he had no documentary evidence to support his testimony that he entered on that date. Id. at 282-283. The BIA expressly affirmed that finding. Id. at 283-84.

In assessing the alien's claim, the Second Circuit held that an IJ's finding of fact could be made in a manner so arbitrary that it becomes a violation of due process, and that was so in this case. Id. at 286. It held that the IJ's complete disregard of the Notice to Appear, which alleged an entry date, in determining the timeliness of the alien's asylum application "amounts to an act of arbitrariness violative of due process." Id. While stating emphatically that it was not finding that the Notice to Appear was, in and of itself, clear and convincing

evidence of the entry date, the Second Circuit held that "the failure of an IJ to give *any* consideration to such an undeniably probative piece of evidence amounts to a denial of the traditional standards of fairness that due process demands." Id. (emphasis in original). The Court therefore vacated and remanded for further consideration of the one-year issue.

While the Second Circuit has developed a more expansive definition of "constitutional claim," the Ninth Circuit has taken a broader view of what constitutes a "question of law." It has held that questions of law include not only "pure" legal questions, but also "application of law to undisputed facts, sometimes referred to as mixed questions of law and fact." Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir. 2007). Moreover, the Ninth Circuit found that the issue of whether the asylum applicant met the "changed circumstances" standard to excuse the late filing of her application was such a mixed question of law and fact over which it had jurisdiction. Id. at 650.

In arriving at this conclusion, the Ninth Circuit covered much of the same territory that the Second Circuit examined in Chen, noting that St. Cyr indicated that questions involving an application of law to undisputed fact should be provided meaningful judicial review, lest serious Suspension Clause questions be raised. Id. at 652. It found that, although the Real ID Act did not expressly address jurisdiction over mixed questions of law and fact, the legislative history indicated that Congress intended to grant review of such questions. Id. at

653. It quoted language from the same Conference Report cited in Chen, that "[w]hen a court is presented with a mixed question of law and fact, the court should analyze it to the extent that there are legal elements, but should not review any factual elements." Id. (citations omitted). Just as the Second Circuit had in Chen, the Ninth Circuit in Ramadan found that the language in the Conference Report about the provision encompassing "constitutional and statutory-construction questions," was not intended to be an exhaustive list, and thus the view that review was limited to statutory construction issues was too limited. Id. at 654. See also Khunaverdiants v. Mukasey, 548 F.3d 760, 765-66 (9th Cir. 2008) (holding that court had jurisdiction to review IJ's finding that the application was untimely when "any view of the historical facts necessarily establishes that the alien filed his application within one year of arrival").

C. The Middle View

All other circuits except the Fourth, which has no published decisions on this issue, and the Eleventh, have taken a narrower view of what constitutes a "constitutional claim" or "question of law," but still allow that there may be some issues that fit into that narrow span. See Khan v. Filip, 554 F.3d 681, 689 (7th Cir. 2009) (noting in *dicta* that "[s]ome discretionary determinations do present underlying, reviewable questions of law, such as those in which the agency is alleged to have applied the wrong legal standard"); Lorenzo v. Mukasey, 508 F.3d 1278, 1282 (10th Cir. 2007) (noting that the court had construed "'constitutional claims or

questions of law' language to reach 'those issues that were historically reviewable on habeas,' namely 'constitutional and statutory-construction questions, not discretionary or factual questions'"); Purwantono v. Gonzales, 498 F.3d 822, 824 (8th Cir. 2007) (holding that, whatever the precise scope of the statute's conferral of jurisdiction is, it "does not extend to review of the agency's findings of fact or its discretionary decision that extraordinary circumstances have not been demonstrated to the 'satisfaction' of the BIA"); Zhu v. Gonzales, 493 F.3d 588, 594 (5th Cir. 2007) (jurisdiction exists only "[t]o the extent that a determination of timeliness turns on a constitutional claim or a question of law"); Pan v. Gonzales, 489 F.3d 80, 84 (1st Cir. 2007) (holding that to trigger the court's jurisdiction, the putative constitutional or legal question must be colorable, and not just "a disguised challenge to factual findings"); Almuhtaseb v. Gonzales, 453 F.3d 743, 748 (6th Cir. 2006) (holding that review under the new statute was limited to constitutional claims and "matters of statutory construction"); Sukwanputra v. Gonzales, 434 F.3d 627, 634 (3d Cir. 2006) (holding that, even after change in law, factual or discretionary determinations are not reviewable); Vasile v. Gonzales, 417 F.3d 766, 768 (7th Cir. 2005) (holding that, even after Real ID, discretionary or factual determinations continue to fall outside the jurisdiction of the court of appeals on petition for review).

Of these Circuits that take a narrower view than the Second and Ninth, only the Fifth and the Tenth have actually held that they had jurisdiction in a particular case. In Diallo v. Gonzales, an alien

who had initially had a timely asylum application that was granted, then later rescinded, filed several years later an amended asylum application adding new information. 447 F.3d 1274, 1277-78 (10th Cir. 2006). The Tenth Circuit held that it had jurisdiction to review the BIA's determination that the amended application was untimely, as this fit into "a narrow category of issues regarding statutory construction." Id. at 1282. That court held that the BIA had misinterpreted the statute in finding that, in the case of aliens whose asylum status is terminated, the one-year period to refile ran from the date of last entry into the United States, and held instead that the period ran from date of termination. Id.

In Nakimbugwe v. Gonzales, the Fifth Circuit held that it had jurisdiction to review an IJ's misapplication of a regulation that determined the filing date of the asylum application for purposes of the one-year bar. 475 F.3d 281, 283-84 (5th Cir. 2007). The regulation in question provided that, in cases where the asylum application was not received by CIS within one year from the applicant's entry date, if the applicant could show clear and convincing documentary evidence that the application had been mailed within one year of entry, the mailing date shall be considered the filing date. Id. at 283 (citing 8 C.F.R. § 208.4(a)(2)(ii) (2000)). The alien produced a certified mail return receipt to show that she mailed the application one day before the one-year deadline, but it was received by CIS four days after. The IJ found that this regulation only applied in cases where CIS never received the application, and not in cases where it

received it late. Id. at 283-284. The Fifth Circuit held that it had jurisdiction to review this issue because the IJ's determination "was based entirely on his construction of a federal regulation, which is a question of law." Id. at 284. The Court went on to conclude that the IJ's conclusion was contrary to the clear and unambiguous language of the regulation, and remanded for a merits ruling on the asylum application. Id. at 284-285.

D. Application to Present Case

The Court should act to resolve this clear Circuit split because, under either the most expansive approach or the middle view, the Eleventh Circuit would have had jurisdiction to review Petitioner's claim that his asylum application was untimely. The existence of the I-94W card showing entry within one year of filing the asylum application, which was in Petitioner's possession, was undisputed, as was Petitioner's consistent testimony as to his arrival date. The IJ's failure to even consider the I-94W because of her speculative reasoning that Petitioner could not have obtained a Dutch passport if he did not speak Dutch, was so arbitrary as to constitute a Due Process violation. Moreover, the IJ's application of the legal standard to these undisputed facts was flawed. In requiring more than documentary evidence combined with consistent testimony, the IJ clearly expected something more than clear and convincing evidence as required to show timely filing.

Secondly, Petitioner raised a valid issue of statutory construction based on the IJ's finding that,

even if she credited the entry date on the I-94W as the entry date, the application was untimely because it was not received in open court until after the one-year deadline. The regulation in question states that, for cases before the Immigration Court, the asylum application "is considered to have been filed on the date it is received by the Immigration Court." 8 C.F.R. § 1208.4(a)(2)(ii). The IJ misconstrued this regulation in finding that the date when Petitioner actually filed the application with the court was not the "filing" date because it was not in open court. Nowhere in the regulation does it state that the application must be filed in open court. Moreover, reading such a requirement into the statute would be blatantly unfair because an applicant has no control over the date he will be summoned to appear in open court. Such a construction would deprive an alien of his right to file a timely asylum application by making it impossible for him to do so. This was a clear issue of statutory construction. Accordingly, any other Circuit would have found that jurisdiction existed in this case.

Finally, this Court should grant *certiorari* here because the Eleventh Circuit's *per se* rule against reviewing any timeliness issues is at odds with all of the other Circuits and fails to give reasoned consideration to the legislative history, as the Second and Ninth Circuits have done. As this Court held in St. Cyr, cutting off all judicial review in immigration cases where habeas review previously was available risks violating the Suspension Clause of the U.S. Constitution. When a court blindly refuses to examine an issue with such large ramifications for the rights of those seeking

political asylum in this country, serious constitutional concerns arise. Accordingly, this Honorable Court should grant certiorari to resolve this Circuit split and in the interests of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ H. Glenn Fogle, Jr.
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Counsel for Petitioner

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12213
Non-Argument Calendar

Agency No. A97-947-677

AMADOU BAILLO BARRY,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(December 31, 2008)

Before CARNES, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Amadou Barry petitions for review of the denial of his application for asylum and withholding of removal under the Immigration and Nationality Act and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(c). The Board of Immigration Appeals and the immigration judge denied Barry's petition for asylum as untimely and found him not credible. We dismiss in part and deny in part Barry's petition.

Barry argues that the Board and immigration judge violated his due process rights by ruling that Barry "failed to prove his date of entry," but Barry's argument challenges the finding that his application for asylum was untimely, which we lack jurisdiction to review. 8 U.S.C. § 1158(a)(3); Chacon-Botero v. U.S. Att'y Gen., 427 F.3d 954, 957 (11th Cir. 2005). Barry also argues that the immigration judge erred by failing to find a change in circumstances, but we lack jurisdiction to review a finding about a change in circumstances. See Chacon-Botero, 427 F.3d at 957. Even if we had jurisdiction to consider the issue, see 8 U.S.C. § 1158(a)(2)(d) (allowing judicial review only of "constitutional claims or questions of law"), Barry did not present that argument to the Board. "[A]bsent a cognizable excuse or exception, 'we lack jurisdiction to consider claims that have not been raised before the [Board].'" Amaya-Artunduaga v. U.S. Att'y Gen., 463 F.3d 1247, 1250 (11th Cir. 2006). We dismiss Barry's petition for review of the denial of his application for asylum.

Barry also contests the denial of his application for withholding of removal, but substantial evidence supports the finding that Barry was not credible. See Al Najjar v. Ashcroft, 257 F.3d 1262, 1283-84 (11th Cir. 2001). Barry entered the United States with a fraudulent passport and provided inconsistent information to immigration officials about the date of his entry. Although Barry wrote in his application that he did not know the location of his father and he had been persecuted for his father's political activities, Barry testified at the asylum hearing that his father had died after Guinean officials tortured him and that government officials had pursued Barry because he organized political rallies. Barry failed to prove his nationality and gave conflicting testimony about the age that he commenced his political activities. Barry also provided an incredible account of a brief interview in English after he presented a Dutch passport to Dutch airport officials. Barry offers no explanation for these inconsistencies that would compel a reasonable fact finder to reverse the adverse credibility finding and conclude that he established eligibility for asylum and withholding of removal.

We **DISMISS** Barry's petition for review of the denial of asylum and **DENY** his petition for review of the denial of withholding of removal.

PETITION DISMISSED IN PART, DENIED IN PART.

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the
Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A97 947 677 - Atlanta, GA

Date: [MAR 31 2008]

In re: AMADOU BAILLO BARRY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: H. Glenn Fogle, Jr., Esquire

ON BEHALF OF DHS Camille Kirk
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent has appealed an Immigration Judge's decision denying his applications for asylum, withholding of removal, protection under the Torture Convention, and finding the respondent's asylum application to be frivolous. The Department of Homeland Security (DHS) has filed a brief in opposition to the appeal. The appeal will be dismissed.

We affirm the Immigration Judge's finding that the respondent failed to meet his burden of demonstrating by clear and convincing evidence that he filed his Application for Asylum and Withholding of Removal (Form I-589) within 1 year of his arrival in the United States, and failed to establish either changed or extraordinary circumstances sufficient to excuse the untimely filing of his asylum application. *See* section 208(a)(2)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1208.4(a). The respondent's submission of a Departure Record (Form I-94) with the name of a Dutch national is not adequate evidence to establish his date of arrival in the United States.

As to the respondent's application for withholding of removal and, as an alternative basis for denying his application for asylum, the Immigration Judge found that the respondent was not credible (I.J. at 16). Although the respondent asserts on appeal that the Immigration Judge's decision lacks specificity, we do not find the Immigration Judge's determination to be "clearly erroneous," as he provided "specific, cogent reasons" for his determination, and offered the respondent an opportunity to explain the noted gaps and inconsistencies (Respondent's brief at 9; I.J. at 15-17). *See* 8 C.F.R. § 1003.1(d)(3)(I) (2007); *Chen v. U.S. Atty. Gen.*, 463 F.3d 1228 (11th Cir. 2006) (citation omitted).

Moreover, we are not persuaded by the respondent's appellate assertion that he established his identity through the submission of a copy of an uncertified, unsigned Guinean birth certificate that

he obtained through a friend, and we affirm the Immigration Judge's determination that the respondent has not established his identity (Exh.6; I.J. at 17-18). Additionally we find that the Immigration Judge correctly determined that the respondent is not entitled to protection under the Convention Against Torture (I.J. at 20).[1]

Finally, we find that the frivolous determination in this case cannot be upheld because the respondent was not afforded sufficient opportunity to explain perceived discrepancies or implausibilities. *See* 8 C.F.R. § 1208.20; *Matter of Y-L-*, 24 I&N Dec.151 (BIA 2007). Therefore he is not permanently barred from applying for other relief under the Act. *See* 8 C.F.R. § 1208.3(c)(5).

ORDER: The appeal is dismissed.

/s/ Molly Kendall Clark
FOR THE BOARD

[1] It is noted that pages 14-19 of the respondent's brief do not relate to the respondent's asylum application or appellate claims.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Atlanta, Georgia

File A 97 947 677 October 5, 2006

In the Matter of

AMADOU BARRY,	)	
	)	IN REMOVAL
Respondent	)	PROCEEDINGS
	)	

CHARGES: 212(a)(6)(A)(i).

APPLICATIONS: Asylum under Section 208 of the Act, withholding under Section 241(b)(3)(A) of the Act, protection pursuant to Article 3 of the Convention Against Torture.

ON BEHALF OF
THE RESPONDENT:

H. Glen Fogle, Jr., Esquire

ON BEHALF OF
THE DEPARTMENT OF
HOMELAND SECURITY:

Rhoshunda Rhodes, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

I. History of the Case

The respondent is a 22 year old male who claims to be a native and citizen of Guinea. He was issued a Notice to Appear on May 10, 2005. In that Notice to Appear he was charged with being subject to removal pursuant to the provisions in Section 212(a)(6)(A)(i) for having arrived in the United States at an unknown place on an unknown day. At a master calendar appearance on September 27, 2005 the respondent appeared with counsel and admitted the allegations in the Notice to Appear and was found removable as charged. Removability was established by clear and convincing evidence. The respondent sought relief from removal in the form of asylum, withholding, and protection under the provisions of the Convention Against Torture. The respondent was twice advised of the consequences of knowingly filing a frivolous application for asylum. Once on September 27, 2005 and again on October 5, 2006 prior to proceeding with this application. The issues before the Court today concern these applications for relief from removal.

II. Documentary Evidence

The documentary evidence in this case consists of the following. Exhibit 1 is the Notice to Appear. Exhibit 2 are the frivolous warnings dated September 27, 2005. Exhibit 3 is a Form I-589. Exhibit 4 is a letter transmitting the application to the Department of State. Exhibit 5 is a Supplemental Exhibit list. Exhibit 6 is a late filed

birth certificate. Exhibit 7 is a Country Report for Guinea. Exhibit 8 is a Form I-213 and Exhibit 9 are the frivolous warnings provided by the Court today on October 5, 2006.

III. Statement of the Facts, Summary of the Testimony

The following is the summary of the testimony based upon the notes taken by the Immigration Judge in the course of the proceedings. This is not a transcript. This matter was heard this morning, October 5th, this decision is being delivered at 2:10 p.m. October 5, 2006. The Immigration Judge does not have the benefit of a transcript to prepare this decision. The mere fact that something is not mentioned in this decision does not mean that it was not heard and that it was not considered in arriving at the final decision. The respondent stated that his name is Amadou Barry. He was born on May 3, 1984 and he was born in Dalaba, Guinea. He says that he is Muslim. He attended six years of school and he said he stopped going to school at 16. He started going to school in 1993. He described his father as a simple businessman and sold rice. He only has one sibling, a younger brother who was born in 1988. He should be about 18 years of age now. He said he stopped going to school because of political attacks because his father was in the opposition party. He said that he was compelled to get involved in the political movement because of his father. He got involved and as time went on he got more experience. He would gather people around and start telling them that the leadership was unfair.

His father supported a single political party. He would gather people for meetings. He described his father as head of the organizing committee for that party. He did not provide any verification as to whether or not the father was an organizing committee for the township, the village, the city, the state or anything of that nature. Rather that position, the father's position, is left unresolved. He got involved in politics because of his father's involvement. He said he became convinced of the party ideology. He started in 1993 but did not start organizing until 1998 because he was too young to do that in 1993. He was asked by the court how old he was when he started engaging in these political activities and he said he was 11. He was told that given the dates that he provided for his date of birth in 1993 he would have been closer to 9 years of age than 11. Then he then corrected his statement to say that he was 9 when he first started getting politically involved.

In 1998, when he was 14, he said he started organizing things on his own. He used to do organizational meetings, galas, soccer tournaments, he would hand out t-shirts with the name of the opposition leader. He organized and showcased students for public speaking and encouraged them to express themselves freely. These meetings were held on soccer fields, near the market, near school, and in soccer tournaments. Soccer tournaments were used to get the masses to expose their ideas. Mostly students took part in these but sometimes his father would take part in the games as well. They would hand out party t-shirts to get people to come. He could not state how many tournaments he organized

but he said he did them about once a year. He organized meetings where again he used to hand out t-shirts. He organized the meetings once a month. These were held by the entrance of the school and soccer fields, by the market, which were in the same places that the previous meetings were held. Mainly students would come to the meetings. Sometimes shoppers at the market would drop by and discuss problems with the government. Some students really listened to him and really were persuaded.

The government noticed that all his family was involved in supporting the political party. Once the respondent was giving a speech in front of masses of students, he identified this as about 300 students, and the next thing he knew he got a subpoena from the government wanting to dismiss him from school. The following Monday he went to school and on that Tuesday he was supposed to give another speech but he had to meet with the principal and he was told that he would be dismissed from school because they noticed that he was too involved with the party and when they started listening to him, according to the respondent, they thought he was a threat to the ruling authorities. He was 16 years of age at that time.

One day his father gave a speech during Friday prayer and the family was so afraid because of the speech and his political activity. They were waiting for the day the government would come and arrest them. People started talking about their political remarks and activism so his father stayed home. However, he, his mother and his brother he initially said spent all the day outside then he said

he meant they were on the move. They would stay a night here, a night there. On May 24, 1999 the father went out and gave a public speech against the regime. He was arrested on May 25, 1999. The respondent was at his grandmother's house. A friend told him about this. His first reaction was to leave and go to the capital. He went to Conakry which was about a 9 or 10 hour drive from Dalaba. He took a cab to go to Conakry. There he stayed with a friend of his father, Ali Gella.

He stayed about a year with Mr. Gella, a little over a year. In June of 2000 he got a letter from his mom that his father was dead. He said his mom said his father was tortured in prison and that lead to his death. He went back to see his mom on June 14, 2000. He went back that night. Around 11 o'clock he said the police came over to the house to arrest them all. He was awake, he heard a car and a truck. The car and truck did not have any headlights and when he heard voices he ran away. He ran out the back door. Again, he returned to Conakry the same night getting a ride on a truck going that way. As he was running away from his family he heard shots and his mother crying. He went back to live with Mr. Gella on June 15, 2000. He stayed there until January 2001 then went to the house of another friend, Mr. Jabi. He stayed with him from January to May of 2001. He had nothing at Mr. Jabi's house.

He left for Sierra Leone when he found that Mr. Gella had been arrested. He went by car to Sierra Leone in Freetown. Again, it was another cab that took him from Conakry to Sierra Leone. Mr. Jabi helped him get a cab. He stayed with another

friend of Mr. Jabi's, Mr. Caba, in Sierra Leone. He stayed there around four years according to his testimony. He did not work at all. Mr. Caba had a store in Freetown. He left Sierra Leone on July of 2004. Mr. Jabi's son had been killed and he said that the Guinean authorities were looking for him according to news he received from Mr. Jabi. He said Mr. Jabi's son had also been tortured while he was in prison. Mr. Jabi told him this.

He left from Sierra Leone and went to Gambia and then to Holland. Mr. Jabi helped him with all of this. He took pictures of him and apparently got him the travel documents and they went to Holland directly from Gambia. They stayed in Holland for two days. He did not pay for anything and he said Mr. Jabi did all of this because he knew that he, the respondent, would be at risk should he remain in Gambia. When asked about the travel document he initially said he did not know what it was. He never saw it. It could be Dutch. He stayed in a hotel for two days and would go outside to get something, apparently food. On Wednesday, he was told they had to go. So they got to the airport and he went to the department where he was asked where he was going and he said the United States.

He came to the United States through Newark, New Jersey. When he got to the airport he said he was asked if he had ever been to the United States before. He said no. His passport was stamped. He said he threw away this passport because it had a name different from his and it was an illegal passport. However, he kept the I-94 because he asked his friends with whom he was apparently

staying about applying for asylum and they told him he had to keep the I-94 to establish his time, place and manner of entry. He did not ask at the airport because when he entered he waited to ask the people who he was staying with because they were his countrymen. He had no contact with his family since he came to the United States. He had no contact while in Sierra Leone absent the, the only contact, the last contact he had was the night apparently when they came.

On cross examination he testified that he was not a native or citizen of the Netherlands. He never got a passport from the Netherlands. He was asked about the statement on the I-589 that the Netherlands issued his last passport and he said it did not belong to him. He said he did not know he needed his own passport or visa to enter the United States. He is not aware of the laws of the United States. He destroyed his passport after learning it was illegal to bear or carry fraudulent documents here. That is why he threw it away.

He inquired about the passport a few months after his arrival. He was asked how he obtained his birth certificate. He said that a friend in Conakry went and got it for him. He gave him all the information and the friend had the respondent's identity card and then he said he did not have the identity card. It was somewhat confusing at this point. His friend got a passport or got the birth certificate issued for him. He said his friend did not claim to be him, did not claim to be the respondent in order to get the passport nor did he provide his friend with permission to obtain that document for

him. He was asked if he had any evidence such as a death certificate attesting to the death of his father. He said no he did not.

He has had no information since June 14, 2000 about the whereabouts of his mother and brother. In fact, information about his personal political activity that he testified to today was not in his affidavit. He said he did not put it in there because he knew he would have to come here today and explain the I-589 and the affidavit attached thereto. He was asked why he made no mention of the speeches, meetings, the subpoena to be dismissed from school. He said he only mentioned and highlighted the big events. The dismissal from school is not such a big event he said. He himself said he was never arrested. His father was the only person in the family who was arrested. However, he had a friend who heard respondent's name being tossed about and when the police came to the house he said they yelled his name. He does not have a copy of the letter from his mother saying that his father died.

He did not seek refuge in Sierra Leone because they had their own problems and Sierra Leoneans sought refuge in Guinea during their civil war. Some of the Guineas, according to the respondent, did not provide refuge when people were deported and there was a bad feeling about that. He said he lived in Sierra Leone for four years. He did not work. This house supported him those four years. Sometimes he would take food over to where Mr. Caba's wife worked and sometimes he would take rice to Mr. Caba's shop and help sort it. He

would also help around the house and help with the kids. He did nothing and did not seek employment at any time when he was in Sierra Leone because he was in hiding. He was not in complete hiding but he would never go out and seek employment for fear of encountering people from Guinea. He never talked to people. He would overhear people talking and notice where they were from by their accent.

He could not live peacefully in Sierra Leone. He tried to stay home as much as possible. He had to be very careful in avoiding encounters with people from Guinea. After Mr. Gella's son was killed and Mr. Jabi helped him leave Sierra Leone to go to Gambia. He said he was just transiting through Gambia and did not seek refuge there because he was looking for a democratic nation that supported democratic ideas and that was the United States. Although he was in Holland for two days he never sought refuge there again because he said he was looking for a nation who believed in democracy and the best nation for that was the United States. He has had no political involvement with the party that he claims to have supported in Guinea since he came to the United States. He said that if he was returned to Guinea and he was not politically involved officials would nonetheless continue to be interested in him because he is wanted by their regime. His departure to Sierra Leone was not detected because he went by car. Moreover if he had been, you always offer bribes to officials at the border. He knew if he came back he would have to go to Conakry. If returned to Sierra Leone the Guinean authorities would have no idea that he had been returned to Africa unless they went to Sierra Leone. He notes

that the Guinean authorities did not know that he was in Sierra Leone before but he noticed more and more Guineans coming to Sierra Leone as time went on.

He claimed he used a Dutch passport to leave the Netherlands. He said he speaks no Dutch. He was asked questions by the Dutch authorities in English in going through airport security. On redirect he was asked by his attorney when he first went to Sierra Leone. He responded May 29, 2001. He said that he left July 30, 2004. He was asked how long he stayed there. He said four years. The attorney pointed out that it appeared to be by in terms of the math a little over three, not four years, but once again the respondent said he stayed in Sierra Leone four years. He could not stay there because Sierra Leone and Guinea were in close proximity and they were in conflict. He was never living legally in Sierra Leone. He had no ID there and he had no right to go back.

IV. Statement of the Law

To be eligible for asylum under Section 208 of the Immigration and Nationality Act the respondent must show that he is unable or unwilling to return to his home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). In Matter of Mogharrabi, 19 I&N Dec. 439 (1987), the Board of Immigration Appeals adopted a reasonableness standard to determine whether the fear of

persecution is well-founded. The regulations provide at 8 C.F.R. 1208.4(a)(2) that the respondent has the burden of establishing that the asylum application was filed within one year of the date of the alien's arrival in the United States or that he or she qualifies for an exception to the one year filing deadline.

To be eligible for a grant of withholding of removal to any country an alien must show that his life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group or political opinion. Section 241(b)(3)(A). This statutory provision requires him or her to demonstrate a clear probability of persecution on one of the five enumerated grounds in the Act. INS v. Stevie, 467 U.S. 407 (1984). An alien must demonstrate that it is more likely than not that he would be the subject of persecution if returned to his native land. This is a more stringent standard than that required to establish eligibility for asylum. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985) laid out the fundamental nature of a social group. Whatever the common characteristic that defines this as a group it must be one that the members of the group cannot change or should not be required to change because it is fundamental to their individual identities or conscience. A particular social group is a group of persons, all of whom share a single immutable characteristic.

To be eligible for protection under Article 3 under the Convention Against Torture the alien must establish that it is more likely than not that he

or she would be subject by torture by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity. 8 C.F.R. 208.18(a)(1). In re J-E-, 23 I&N Dec. 291 (BIA 2002). In re S-V-, 22 I&N 1306 (BIA 2000). For an act to constitute torture it must cause severe physical or mental pain or suffering, it must be intentionally inflicted, it must be inflicted for a prescribed purpose, it must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody and control of the victim and it cannot arise from lawful sanctions. In re J-E-, 23 I&N 291 (BIA 2002). As noted in Matter of S-V-, the United Nations Committee Against Torture has stated that the existence of gross, flagrant human rights violation in the country of removal does not constitute a basis for determining that a particular individual would be at risk if returned to a particular country. Rather, specific grounds must indicate that the individual would be personally at risk.

V. Findings of the Court

The application in this case was filed on September 27, 2005. Thus, it is subject to the provisions of the REAL ID Act. The first question that the court must address is a threshold of eligibility for the relief requested. The respondent contends that the submission of the I-94 in the name of another person establishes that he filed the application within one year of entry. The Court will note the following. The respondent was issued a Notice to Appear on May 10, 2005 following his apprehension by Immigration and Customs

Enforcement on May 6, 2005. The respondent has utterly failed to establish that he filed the application within one year of coming to the United States. The submission of an I-94 in the name of another individual, a purported Dutch citizen who entered by virtue of the Visa Waiver Program, does not establish that the respondent entered as that Dutch citizen. The respondent claims that he came from the Netherlands to the United States on a Dutch passport which he subsequently threw away because it was illegal to have it. However, he kept the I-94. He claims he kept the I-94 because friends from his country informed him about asylum and told him that he had to be able to prove that he had filed it within a year of entry. The evidence submitted simply does not establish this. It is the respondent's burden, as stated above, to establish that the I-589 was filed within one year of entry. The respondent simply cannot do that.

Accordingly, the Court finds that this matter cannot be considered for asylum. The Court will note as follows. Even if the Court credited and found the copy of the I-94 submitted in this matter as proof that the respondent came to the United States on August 4, 2004 using a Dutch passport under the Visa Waiver Pilot Program, that would still not establish that the I-589 had been filed within a year of entry. The respondent states that the I-94, states that respondent was admitted, or whoever has this I-94, was admitted August 4, 2004. The application for asylum was filed September 27, 2005. It was received by the Court September 27, 2005, more than a year after the alleged entry. It was received in Court September 27, 2005 according to the stamp

provided by Immigration Judge Rast when the document was filed in Court.

An asylum application must be filed in open Court. So this application will be considered for withholding and protection under the provisions of the Convention Against Torture. The basis of the claim is that the respondent claims to have come from a politically active family in Guinea. First the respondent claims to be a Guinean citizen and claims to have come from a politically active family. He claims that he himself is politically active. He claims that his father was arrested and tortured and killed. He claims that the police were looking for him. He claims that because of his political beliefs that he would be subject to persecution or death if returned to Guinea.

The credibility of the respondent is of extreme importance in assessing the claim. In determining the respondent's credibility I have taken into account such factors as his demeanor, candor, responsiveness and the rationality, internal consistency and inherent persuasiveness of his testimony. In this regard, the court does not find that the respondent was credible. A number of instances that the Court finds go to the substance of his credibility. In the overall picture the I-589 differed in material respects from the respondent's testimony that the respondent's claim that he did not put everything on the I-589 because he knew he had to come to Court to explain everything today simply does not pass muster.

The respondent was represented by counsel. The application was prepared by counsel. There is absolutely no reason why the respondent would not have provided full and complete information for the completion of the I-589. Morever, because he was prepared by counsel and because counsel is aware of the fact that the I-589 is sent to the Department of State for review and comment, there is no reason to suppose that counsel would not have attempted to get all of the information to be included in the application that would go to the State Department for comment. For example, the respondent claimed to have been personally an active political organizer. He claimed that he was issued a subpoena requiring his dismissal from school because of his political activity. He claims that he himself was a political speaker, that he organized, beginning at the age of 9. He said he spoke to masses of students on April 13, 1999. He spoke to 300 students. Although his explanation as to why this was not on his I-589 was that he mentioned and highlighted big events. The dismissal from school was not a big event, apparently neither was his speaking to masses of students a big event. The Court simply does not believe his explanation for not including all of this on the Form I-589 that was filed with the Court.

The court also finds that the respondent has failed in a material respect in establishing his identity. He claims to be from Guinea. He submitted an unauthenticated birth certificate from that country. See Exhibit 6. This was late filed, well past the deadline for filing documents. Moreover, there are problems with the birth certificate. The Court will note that there is no signature, there is what

purports to be a stamp on the birth certificate, a seal of some sort. There are no signatures on the birth certificate. There is no certification on the birth certificate. There is nothing to establish the authenticity of this birth certificate or even that it belongs to the respondent. The respondent's explanation as to how he got it rings hollow, in light of the fact that he provided nothing to establish that the document originated in Guinea. There is no letter from his friend saying that "I've gotten your birth certificate, here it is." There is no envelope that the birth certificate was supposed to have been sent in. There is nothing to establish that this document originated in Guinea. Even if it could be established that it originated in Guinea, there would be the additional problem that there is no way of determining that it belongs to the respondent.

A fundamental element of any claim for asylum is to establish nationality and citizenship when claiming in an application for asylum and withholding of removal and protection under the Convention Against Torture that they would be at risk and subject to persecution if returned to a particular country. The alien has the burden of establishing the nexus with the country whether it be establishing citizenship or lawful residence there or that this is where the respondent lived and this is where he or she would be at risk if returned. Failure to establish the country of citizenship and nationality is fatal to any claim of asylum, of withholding and protection under the provisions of the Convention Against Torture. The Court finds that first the respondent's credibility issues, the Court does not find the respondent's claim that he

was able to travel from Gambia to the Netherlands on a Dutch passport without being questioned by Dutch authorities upon presentation of the passport to enter the Netherlands when he does not speak one word of Dutch according to his own testimony credible. The Court does not believe that he would not questioned by the Dutch authorities in presenting the passport and leaving the Netherlands. The respondent claims that he was questioned at all times in English. Why Dutch authorities would question a Dutch citizen bearing a Dutch passport in English is inexplicable.

The Court has mentioned other problems with the respondent's credibility, the fact that the I-589 differed in material aspects from the testimony that he provided here today. The respondent has failed to introduce any corroborating evidence. Now the respondent has testified here today that he came here, that he stayed with friends from his country who told him how to apply for asylum. Those people are presumably still here in the United States. There are no letters, there is nobody from his country here to testify to say that they knew him, where they knew him, how they knew him, that he stayed with them when he came to the United States. In short, there is absolutely no corroborating evidence at all.

Accordingly, the Court would find that the respondent has failed to meet his burden. He has failed to establish that he filed the asylum application within one year of coming to the United States. Even if it should be found that he had filed it in a timely fashion, then the Court has laid out the reasons why it does not believe that it is possible,

but even if it were to be found that he had filed the application within a year of entry, the Court would find that he has nonetheless failed to meet the burden of establishing eligibility for the relief sought. The Court also finds that the respondent's application must be viewed in light of all the many inconsistencies with which the respondent was confronted and which he failed to respond to adequately, in the eyes of this Court, that the respondent's application must also be deemed to be frivolous. The Court does not make this finding lightly. However, the court does believe that the respondent's application clearly falls within the grounds of an application that could be found to be frivolous. The Court will note the respondent received two frivolous warnings. The Court will further note that the respondent, when confronted with discrepancies between testimony and application, failed to provide explanations for those discrepancies.

Accordingly, the Court finds that the respondent's application is frivolous. The Court also finds that the respondent has failed to establish a basis for withholding of removal. Having found that the respondent's testimony is not credible in all material aspects the Court cannot find that he has established a basis for withholding and the Court will make the same credibility findings in regard to any claim for protection under the provisions of the Convention Against Torture. Accordingly, the Court finds that the respondent has failed to establish eligibility for any of the relief that he seeks. The Court issues the following orders.

ORDERS

IT IS ORDERED that the respondent be and is found removable pursuant to Section 212(a)(6)(A)(i).

IT IS FURTHER ORDERED that the respondent's application for asylum be and the same is hereby denied for failure to file timely. Alternatively, the Court would find that the application be and the same is hereby denied for failing to meet the burden. The Court would also find that the application is frivolous. Further the Court finds that the respondent has failed to meet his burden of establishing eligibility for withholding and the Court finds that the respondent has failed to meet his burden of establishing eligibility for protection under the provisions of the Convention Against Torture. Accordingly, all applications are denied.

The respondent is ordered removed to his country of nativity and citizenship as contained on the Notice to Appear, Guinea.

Done and ordered this 5th day of October 2006.

/s/ Grace A. Sease
GRACE A. SEASE
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before GRACE A. SEASE in the matter of:

AMADOU BARRY

A 97 947 677

Atlanta, Georgia

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Rhonda S. Smith
Rhonda S. Smith (Transcriber)

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June 19, 2007
(Completion Date)

No. 08-1216

In the Supreme Court of the United States

AMADOU BAILLO BARRY, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner failed to prove, by clear and convincing evidence, that he filed his asylum application within one year of arriving in the United States.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 305 Fed. Appx. 631. The decisions of the Board of Immigration Appeals (Pet. App. 4a-6a) and the immigration judge (Pet. App. 7a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2008. A petition for a writ of certiorari was filed on March 31, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA) provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asy-

lum to an alien who demonstrates that he is a refugee within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

An alien applying for asylum must file his application within one year of arriving in the United States, unless he demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances that materially affect his eligibility for asylum or extraordinary circumstances that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that his application for asylum was filed within one year of his entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

b. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination regarding whether the changed or extraordinary circumstances exception applies. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioner claims to be a native and citizen of Guinea. Pet. App. 8a, 9a. He entered the United States illegally on an unknown date and at an unknown location. *Id.* at 8a, 13a-14a. He came to the attention of immigration officials after he was arrested in Atlanta, Georgia, for possessing and distributing counterfeit merchandise at a flea market. Administrative Record (A.R.) 121, 175, 261.

United States Immigration and Customs Enforcement (ICE) initiated removal proceedings against petitioner. A.R. 269-270. He was charged with being removable as an alien present in the United States without having been admitted or paroled, or who had arrived in the United States at any time or place other than one designated by the Attorney General. Pet. App. 7a; A.R. 269; see 8 U.S.C. 1182(a)(6)(A)(i).

Petitioner appeared before an immigration judge (IJ) and conceded that he was removable as charged. Pet. App. 8a; A.R. 106. He then sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d

Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 8a; A.R. 254-265.

The IJ held a hearing, at which petitioner was the sole witness. A.R. 111-172. Petitioner contended that he would be persecuted if he returned to Guinea because he and his father were political activists who opposed the ruling party. Pet. App. 9a-12a. Petitioner stated that he left Guinea in 2001, spent four years in Sierra Leone, and then went to the Gambia and on to the Netherlands before entering the United States. *Id.* at 12a-13a. He claims that he entered the United States on August 4, 2004, in Newark, New Jersey. *Id.* at 13a-14a, 20a; A.R. 146-147, 149-150. In support of that contention, petitioner presented a copy of a visa waiver departure form (Form I-94), dated August 4, 2004, which authorized a person named Henry Wija to be admitted to the United States for a period of 90 days. A.R. 102-103, 166, 266. Petitioner asserted that he used that form, along with a fraudulent Dutch passport, to gain entry into the United States. Pet. App. 14a; A.R. 146. Petitioner did not present the passport he used to enter the United States to the IJ, saying that he had destroyed it. Pet. App. 14a; A.R. 113, 146-147.

The IJ found petitioner removable as charged, A.R. 106-107, and denied his claims for asylum, withholding of removal, and CAT protection, Pet. App. 7a-26a. As a threshold matter, the IJ found that petitioner was not eligible for asylum because he failed to demonstrate, by clear and convincing evidence, that he filed his asylum application within one year of his entry into the United States. *Id.* at 19a-20a. The IJ explained that the only evidence petitioner presented regarding his date of entry was a copy of a Form I-94, which had been issued "in the name of * * * a purported Dutch citizen who en-

tered by virtue of the Visa Waiver Program," and found that the submission of that form, without more, did not "establish that [petitioner] entered as that Dutch citizen." *Id.* at 20a. The IJ noted that petitioner claimed that "he came from the Netherlands to the United States on a Dutch passport," but petitioner did not present that passport, claiming that he threw it away. *Ibid.* The IJ found petitioner's explanation for why he discarded the passport implausible, *ibid.*, and did not believe petitioner's story that he was able to enter the Netherlands "on a Dutch passport without being questioned by Dutch authorities upon presentation of the passport * * * when he does not speak one word of Dutch." *Id.* at 24a. The IJ concluded that "the evidence simply does not establish" that petitioner entered the United States on the date he claimed, and that he therefore could not show that he filed his asylum application within one year of entry. *Id.* at 20a.[1]

The IJ then rejected petitioner's claims for withholding of removal and CAT protection on the merits. Pet. App. 21a-25a. The IJ determined that petitioner was not credible due to numerous inconsistencies and implausi-

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[1] The IJ also held that, even if petitioner could prove his date of entry, he failed to file his asylum application within one year of that date because the application was not filed in open court until almost two months after the one-year deadline had passed. Pet. App. 20a-21a. The Board of Immigration Appeals (Board) did not adopt or address that holding, and thus is not part of the agency decision under review. See, *e.g.*, *Singh* v. *United States Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009).

The IJ also determined that petitioner's asylum application was "frivolous," so that he was permanently ineligible for benefits under 8 U.S.C. 1158(d)(6). Pet. App. 25a. The Board did not uphold that determination, *id.* at 6a, and it therefore is not part of the agency decision under review.

bilities in his testimony. *Id.* at 10a, 21a-25a. The IJ also noted that there was "absolutely no corroborating evidence" to support petitioner's story, not even letters from family members or friends in Guinea or testimony from friends or acquaintances in the United States. *Id.* at 24a.

The IJ determined that petitioner wholly failed to prove his identity or citizenship, which is necessary to a claim for asylum, withholding of removal, or CAT protection. Pet. App. 23a-24a. Petitioner had provided a document that he claimed was a copy of his birth certificate, but the IJ determined that it was insufficient to establish petitioner's identity because it was not signed and had not been authenticated; there was no evidence that it originated in Guinea; there was no evidence that petitioner is the person named on the birth certificate; and petitioner's story that a friend simply obtained it for him without any form of written permission was implausible. *Id.* at 16a-17a, 22a-23a.

In addition to finding that petitioner had failed to prove his identity, the IJ determined that petitioner's account of his political activities was not credible. Pet. App. 21a-25a. The IJ observed that petitioner's written narrative of events in his asylum application "differed in material respects from [his] testimony," and his claim that "he did not put everything on the [application] because he knew he had to come to Court to explain everything * * * simply [did] not pass muster." *Id.* at 21a. The IJ explained that the application had been prepared with the assistance of counsel, and it was implausible that counsel would have omitted petitioner's claimed political activities (such as organizing rallies and speaking before crowds of 300 students) from his written claim for political asylum. *Id.* at 22a. The IJ also noted

that there were several inconsistencies in petitioner's story, and when confronted with those inconsistencies, petitioner failed to provide any explanation for them. *Id.* at 25a. The IJ therefore determined that, "even if it were to be found that [petitioner] had filed the [asylum] application within a year of entry," petitioner "nonetheless failed to meet the burden of establishing eligibility for" asylum. *Ibid.* The IJ further concluded that, because petitioner's testimony about his political activities was not credible, he also failed to establish a basis for withholding of removal or CAT protection. *Ibid.*

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 4a-6a. The Board affirmed the IJ's determination that petitioner failed to prove, by clear and convincing evidence, that he filed his asylum application within one year of entering the United States, explaining that petitioner's "submission of a Departure Record (Form I-94) with the name of a Dutch national is not adequate evidence to establish his date of arrival in the United States." *Id.* at 5a. The Board also affirmed the IJ's finding that petitioner was not credible, explaining that the IJ provided "specific, cogent reasons" for her decision and "offered [petitioner] an opportunity to explain the noted gaps and inconsistencies." *Ibid.* (internal quotation marks omitted). The Board also agreed with the IJ that "a copy of an uncertified, unsigned Guinean birth certificate" did not establish petitioner's identity, and held that the IJ correctly determined that petitioner was not entitled to withholding of removal and CAT protection. *Id.* at 5a-6a.

4. The court of appeals dismissed in part and denied in part petitioner's petition for review. Pet. App. 1a-3a. The court dismissed the petition with respect to petitioner's asylum claim on the ground that it lacked juris-

diction over the claim. *Id.* at 2a. The court explained that, although petitioner contended that the Board "violated his due process rights by ruling that [he] failed to prove his date of entry," the substance of petitioner's contention was that the Board erred in finding as a factual matter that his asylum application was untimely, and the court lacked jurisdiction to consider such a claim under 8 U.S.C. 1158(a)(3). Pet. App. 2a (citing *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (internal quotation marks omitted)). The court also rejected petitioner's argument that the Board erred in failing to find changed circumstances that would excuse his late filing, because petitioner failed to present that argument to the Board. *Ibid.*

The court of appeals then denied the petition with respect to petitioner's claims for withholding of removal and CAT protection. Pet. App. 3a. The court determined that "substantial evidence supports the finding that [petitioner] was not credible." *Ibid.* The court noted that petitioner "provided inconsistent information to immigration officials about the date of his entry"; presented contradictory testimony about whether his father had been mistreated because of his political activities; "failed to prove his nationality"; "gave conflicting testimony about the age that he commenced his political activities"; and "provided an incredible account of a brief interview in English after he presented a Dutch passport to Dutch airport officials." *Ibid.* Because petitioner "offer[ed] no explanation for these inconsistencies that would compel a reasonable fact finder to reverse the adverse credibility finding," the court affirmed the

agency's denial of withholding of removal and CAT protection. *Ibid.*[2]

ARGUMENT

Petitioner contends (Pet. 4-13) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's conclusion that he failed to prove, by clear and convincing evidence, that he filed his asylum application within one year of arriving in the United States. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case is not an appropriate vehicle to consider the question presented because petitioner's asylum claim fails on the merits. Further review of petitioner's fact-bound claim is therefore unwarranted.

1. The court of appeals correctly held that it lacked jurisdiction to review petitioner's challenge to the Board's finding that his asylum application was untimely. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding an exception to the one-year filing deadline for asylum claims. As petitioner acknowledges (Pet. 2, 4), his petition for review challenged a determination that his asylum application was untimely. Judicial review of petitioner's claim is therefore barred under 8 U.S.C. 1158(a)(3) unless the exception for "constitutional claims or questions of law" in 8 U.S.C. 1252(a)(2)(D) applies.

As the court of appeals correctly determined, petitioner's claim does not raise any "constitutional claims or questions of law" within the meaning of Section

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[2] Petitioner does not challenge the court of appeals' rejection of his claims for withholding of removal and CAT protection in his petition, and those claims therefore are not before the Court.

1252(a)(2)(D). Pet. App. 2a. First, petitioner suggests that the Board's finding that he failed to establish that his asylum application was timely filed raises a constitutional claim because it "was so arbitrary as to constitute a Due Process violation." Pet. 13. Second, he asserts that his challenge raises a question of law because, in his view, the Board did not apply "the correct standard of review" in determining whether his asylum application was timely. Pet. 2. Third, he states that his challenge presents "an issue of statutory construction" because the IJ erred in holding that his application would not be deemed filed until it was received in open court. Pet. 13-14.

As an initial matter, petitioner did not present any of these three contentions to the Board, and the federal courts therefore may not review them. See 8 U.S.C. 1252(d)(1) ("A court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right."); see also A.R. 39 (petitioner's brief to the Board argued only that "the IJ erred in finding that [petitioner] 'utterly failed' to establish that he timely filed his asylum application within one year of his arrival in the United States"). Moreover, petitioner's third contention (regarding whether an application must be filed in open court) cannot provide a basis for jurisdiction. The Board did not affirm the IJ's determination about when the asylum application was filed, instead simply holding that petitioner failed to show his entry date. Pet. App. 5a. The IJ's determination about when the application was filed therefore was not part of the agency decision that is under review. See, *e.g.*, *Singh* v. *United States Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009).

In any event, petitioner's challenges to the Board's fact-bound determination of ineligibility based on his lack of credibility does not raise a "constitutional claim[] or question[] of law" that would permit judicial review under 8 U.S.C. 1252(a)(2)(D). Whether a petition for review raises such a claim depends on the substance of the claim, not merely the label the alien appends to it. See, *e.g.*, *Jarbough* v. *United States Att'y Gen.*, 483 F.3d 184, 189 (3d Cir. 2007) (courts of appeals "are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim"). Petitioner's argument is that the agency should have credited the copy of a Form I-94 issued to a different person as clear and convincing evidence of petitioner's entry into the United States on a certain date, A.R. 39, and that argument is nothing more than a challenge to the agency's factfinding, see Pet. App. 2a. Petitioner's invocation of the Due Process Clause does not change the nature of his claim, and petitioner provides no colorable argument that the agency used an incorrect legal standard in evaluating his claim.[3] If petitioner's challenge to the Board's factfinding were considered a "constitutional claim[] or question[] of law" under Section 1252(a)(2)(D), that phrase would lose all meaning. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's

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[3] Petitioner argues (Pet. 13) that the Board must have required a higher standard of proof than clear and convincing evidence because it rejected his claim, but that is incorrect; the Board clearly explained that it rejected petitioner's claim because he failed to meet his burden of proof by supporting his claimed date of entry into the United States with an unauthenticated document issued in the name of a different person. Pet. App. 5a.

decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 548 U.S. 906 (2006). The court of appeals therefore correctly held that it lacked jurisdiction over petitioner's asylum claim.

2. There is no circuit conflict over the question presented in this case. As the government noted in its brief in opposition (at 10-11) in *Viracacha* v. *Mukasey*, cert. denied, No. 07-1373 (Oct. 20, 2008), the courts of appeals have disagreed about whether they have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to adduce sufficient facts to demonstrate "extraordinary circumstances" or "changed circumstances" to justify the untimely filing of an asylum application.[4] This case does not implicate that

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[4] The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that such a contention normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (extraordinary or changed circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (changed circumstances); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). The Ninth Circuit, in contrast, has held that an alien's challenge to the Board's determination that he has not established "changed circumstances" or "extraordinary circumstances" does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D) when it involves the application of law to undisputed facts. See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances).

disagreement, however, because petitioner's claim is not that the Board erred in deciding that he failed to show changed or extraordinary circumstances warranting a late filing. As the court of appeals correctly noted, petitioner did not present that argument to the Board, and the court of appeals therefore could not review it. Pet. App. 2a; see 8 U.S.C. 1252(d)(1); see also A.R. 39. Because petitioner has failed to exhaust any argument regarding circumstances that would excuse his untimely filing, and the court of appeals did not pass on any such argument, his petition does not present the question on which the circuits have disagreed.

Petitioner cites a variety of cases (Pet. 6-13) to suggest that there is a circuit conflict on the question whether a court of appeals has jurisdiction to review the Board's decision that an asylum application was not timely filed, but none of them demonstrates such a conflict. As an initial matter, the decision below is unpublished and it does not establish controlling precedent, Pet. App. 1a; see 11th Cir. R. 36-2, and it therefore does not give rise to the type of conflict in published decisions that would warrant this Court's attention.

In any event, all of the cited decisions agree that courts of appeals generally lack jurisdiction to review a challenge to a timeliness determination, unless the challenge raises a constitutional claim or question of law. And that view is wholly consistent with the decision below. Contrary to petitioner's contention (Pet. 6, 14), the court of appeals in this case did not adopt a per se rule that the courts of appeals never have jurisdiction to review a determination that an asylum application was untimely. Instead, it correctly recognized that 8 U.S.C. 1158(a)(3) generally bars review of such determinations, but that 8 U.S.C. 1252(a)(2)(D) permits them to be re-

viewed if they raise constitutional claims or questions of law. Pet. App. 2a (citing *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005)).

The decision below does not conflict with any of the decisions petitioner cites. Most of the cases address claims other than the type raised by petitioner, and therefore cannot present a conflict on the question presented here. For example, several of the cases address whether an alien demonstrated "changed circumstances" or "extraordinary circumstances" to excuse an untimely asylum filing. See, *e.g.*, *Khan* v. *Filip*, 554 F.3d 681, 687-688 (7th Cir. 2009); *Purwantono* v. *Gonzales*, 498 F.3d 822, 824 (8th Cir. 2007); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007); *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (9th Cir. 2007); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006). That issue is not presented here. See pp. 12-13, *supra*. Another case petitioner cites, *Lorenzo* v. *Mukasey*, 508 F.3d 1278 (10th Cir. 2007), involved reinstatement of a removal order, not the timeliness of an asylum application, and it is therefore inapposite.

The remaining cases are wholly consistent with the decision below. Two of the cases are factually similar to this case. In those cases, the aliens argued that the Board erred in finding that they failed to meet their burden of showing, by clear and convincing evidence, that they filed their asylum applications in a timely manner, and the courts held that they lacked jurisdiction to consider those claims under 8 U.S.C. 1158(a)(3). See *Pan* v. *Gonzales*, 489 F.3d 80, 84-85 (2d Cir. 2007); *Vasile* v. *Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005). In those cases, as in the decision below, the courts correctly rec-

ognized that a challenge to the agency's factfinding did not raise a constitutional claim or question of law. See *Pan*, 489 F.3d at 84-85 (no jurisdiction to consider alien's claim "that the IJ simply got the facts wrong"); *Vasile*, 417 F.3d at 768 (no jurisdiction over Board's "factual determination about when [the alien] filed his asylum claim").

The remaining cases petitioner cites are distinguishable. In *Zheng* v. *Mukasey*, 552 F.3d 277 (2d Cir. 2009), for example, the court of appeals determined that the alien raised a colorable constitutional claim, which was whether the IJ's complete failure to address probative evidence of the alien's date of entry violated due process. *Id.* at 285-286. *Zheng* is nothing like this case, however, because there, the evidence was an undisputed statement by a government agent in a notice to appear that the alien had entered on a certain date, *id.* at 285, and here, the only evidence was a copy of a Form I-94 for a different person and petitioner's incredible testimony, Pet. App. 5a, 19a-25a. Moreover, in *Zheng*, the IJ wholly failed to mention the evidence, 552 F.3d at 285-286, whereas in this case there is no doubt that the agency considered petitioner's evidence and found it insufficient, Pet. App. 5a. Indeed, the *Zheng* court made clear that a case such as this one—which "essentially disputes the correctness of [the agency's] fact-finding"—would not raise a constitutional claim or question of law. 552 F.3d at 285 (internal quotation marks omitted).

Nakimbugwe v. *Gonzales*, 475 F.3d 281 (5th Cir. 2007), is likewise inapposite. In that case, there was no dispute about historical facts; rather, the issue before the court was whether the relevant federal regulation should be interpreted to permit the mailing date of an

asylum application to be considered the filing date of the application. *Id.* at 284-285. As the court explained, there was jurisdiction under 8 U.S.C. 1252(a)(2)(D) because "the IJ's determination was based entirely on his construction of a federal regulation, which is a question of law." *Id.* at 284. *Diallo* v. *Gonzales*, 447 F.3d 1274 (10th Cir. 2006), is similar. There, the alien raised a statutory-interpretation question regarding whether an alien who files an asylum application, leaves the United States, and then returns must file a new application. *Id.* at 1282. Here, in contrast to those cases, petitioner challenged only the agency's factfinding; his claim that his application was timely does not depend on any issue of statutory construction.

Finally, *Khunaverdiantis* v. *Mukasey*, 548 F.3d 760 (9th Cir. 2008), is markedly different from this case. In that case, there was no dispute in the relevant historical facts; rather, the dispute centered on whether an alien was required to demonstrate his exact date of arrival, or only that he had filed his application with one year of arrival, under 8 U.S.C. 1158(a)(2)(B). 548 F.3d at 765. Here, however, petitioner seeks review of the Board's factfinding. For that type of claim, the *Khunaverdiantis* court agreed that the courts of appeals would lack jurisdiction. *Ibid.* Petitioner has not identified any court that would find jurisdiction over a fact-bound claim such as his, and there is therefore no disagreement in the circuits warranting this Court's review.

3. Even if there were disagreement in the circuits on the question presented, this case would present a poor vehicle for considering that question, because petitioner's asylum application was untimely and because his asylum claim fails on the merits.

First, petitioner has not shown that the Board's determination that he failed to demonstrate that his asylum application was timely filed was unsupported by substantial evidence. The IJ found that petitioner failed to produce sufficient evidence to show his date of entry into the United States by clear and convincing evidence, Pet. App. 19a-20a, and the Board agreed, *id.* at 5a. Both the IJ and the Board explained that "submission of a Departure Record (Form I-94) with the name of a Dutch national is not adequate evidence," when combined with petitioner's incredible testimony, "to establish his date of arrival in the United States." *Ibid.*; see *id.* at 19a-20a. If the court of appeals were to consider the timeliness question, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). On this record, petitioner could not show that the Board's fact-specific conclusions about the sufficiency of his evidence in support of his claimed date of arrival were not supported by substantial evidence. That is particularly true in light of the agency's finding that petitioner was not credible, a finding affirmed by the court of appeals, and a finding that petitioner has not challenged here.

Second, even if his application had been timely, petitioner has not demonstrated that qualifies for asylum. The IJ found that petitioner's story of his political activism was wholly incredible, Pet. App. 21a-25a; the Board agreed, *id.* at 5a; and the court of appeals upheld that finding as supported by substantial evidence, *id.* at 2a. Indeed, the agency found that petitioner did not even adduce sufficient credible evidence to prove his identity

and nationality, let alone sufficient evidence to substantiate his claimed fears of persecution, *id.* at 5a-6a, and the court of appeals affirmed that determination, *id.* at 3a. Petitioner does not challenge those holdings before this Court. Because petitioner presented no credible testimony in support of his claim for political asylum, there is no reasonable prospect that his asylum claim would succeed. Further review of petitioner's fact-bound claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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